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No. 87-924

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

HENRY J. KAISER COMPANY,
STANDARD OIL COMPANY OF CALIFORNIA,
CHEVRON CHEMICAL COMPANY
and EUGENE GREEN,
Petitioners,

VS.

DONALD PAIGE and ANDREW HARRIS,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I

INTRODUCTION 1

II

RESPONDENTS' ARGUMENT THAT THEIR STATE TORT CLAIMS ARE SAVED FROM PRE-EMPTION BECAUSE THEY FURTHER FEDERAL OSHA POLICY IS INCORRECT BECAUSE THE CLAIMS INVOKE POLICY, NOT SPECIFIC FEDERAL REMEDIES 2

III

THE PRESUMPTION OF ARBITRABILITY APPLIES TO WORKPLACE SAFETY DISPUTES 6

CONCLUSION 8

TABLE OF AUTHORITIES CITED

Cases

Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ... 3

Atchison, Topeka and Santa Fe R. Co. v. Buell, ____ U.S. ____, 107 S.Ct. 1410, 94 L.Ed. 2d 563 (1987) 3

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 3

Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974) 2, 5, 6, 7

Hentzel v. Singer Co., 188 Cal.Rptr. 159 (Cal.App. 1982) 5

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007 (1984) 3

Lancaster v. Norfolk and Western Ry. Co., 773 F.2d 807 (7th Cir. 1985) 3

Lewy v. Southern Pacific Transp. Co., 799 F.2d 1281 (9th Cir. 1986) 3

Lingle v. Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987), *cert. granted,* ____ U.S. ____, 108 S.Ct. 226 (1987) 2, 6, 8

McDonald v. West Branch, 466 U.S. 284 (1984) 3

Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) 3

Paperworks v. Misco, Inc., 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651) 5, 7

Price v. PSA, Inc., 829 F.2d 871 (9th Cir. 1987) 5, 6

Scott v. Machinists Automotive Trades Dist. Lodge No. 190, 827 F.2d 589 (9th Cir. 1987) 6

Survival Sys. Div. of Whittaker Corp. v. District Court, 825 F.2d 1416 (9th Cir. 1987) 6

Whirlpool Corporation v. Marshall, 445 U.S. 1 (1980) 7

TABLE OF AUTHORITIES CITED

Statutes

	Page
California Occupational Health and Safety Act, Cal. Lab. Code:	
§ 6300 *et seq.*	4
§ 6310	4
§ 6311	4
Civil Rights Act of 1871, 42 U.S.C. § 1983	3
Fair Labor Standards Act of 1938, 29 U.S.C. § 201-219	3
Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*	3
Federal Mine Safety and Health Act:	
30 U.S.C. §§ 801 *et seq.*	7
30 U.S.C. § 815(c)(1)	7
Federal Occupational Safety and Health Act:	
29 U.S.C. §§ 651-678	1
29 U.S.C. § 651-660(c)	4
29 U.S.C. § 660(c)(1)	7
29 U.S.C. § 660(c)(2)	4
Labor Management Relations Act, 29 U.S.C. § 171 *et seq.*	2, 3
National Labor Relations Act, as amended, 29 U.S.C. § 151-169	3
Railway Labor Act, 45 U.S.C. § 151 *et seq.*	3
28 U.S.C. § 1441(c)	5

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I

INTRODUCTION

Petitioners submit this reply brief, in accordance with Supreme Court Rule 22.5, to respond to the arguments first raised in the opposition brief filed by respondents Donald Paige and Andrew Harris.

Respondents argue that because the federal Occupational Safety and Health Act ("Fed/OSHA"), 29 U.S.C. §§ 651-678, allows states to adopt a health and safety scheme at least as rigorous as that required by Fed/OSHA, their state public policy wrongful discharge claim, which cites Cal/OSHA, and their working conditions claims are not pre-empted because they further the federal policy of worksite safety and therefore are not subject to the arbitration procedures of their collective-bargaining

agreement. In this respect, respondents contend, their case is distinguishable from the conflict within the Circuits motivating the Court to accept certiorari of *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S.Ct. 226 (1987). As discussed below, this argument is not supported by this Court's decisions.

Accompanying their argument that this case presents not a question of pre-emption but of "accommodation" between federal statutes is respondents' assertion that their state causes of action, because they are based on a public policy of workplace safety, displace arbitration as a favored remedy. This contention, too, is unavailing, as demonstrated by the Court's decision in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

II

RESPONDENTS' ARGUMENT THAT THEIR STATE TORT CLAIMS ARE SAVED FROM PRE-EMPTION BECAUSE THEY FURTHER FEDERAL OSHA POLICY IS INCORRECT BECAUSE THE CLAIMS INVOKE POLICY, NOT SPECIFIC FEDERAL REMEDIES

Seeking to obscure their failure to exhaust the arbitration requirement of their labor contract or to avail themselves of the express make-whole remedies under either the federal or state OSHA statutes, respondents in their opposition brief attempt to sidestep the presumption of arbitrability by claiming that their state public policy-related tort claims actually assert rights guaranteed by Congress in the federal OSHA statute that displace the arbitration obligation honored by § 301 of the Labor-Management Relations Act ("LMRA"). Such a contention is flawed and does not provide a reason to deny certiorari in this case. State tort claims based on the "policy" underlying a federal statute, as opposed to claims invoking a specific federal statutory remedy, cannot be maintained by employees subject to an arbitration requirement.

It is true that despite the strong federal labor policy favoring arbitration of workplace disputes, this Court has permitted individual workers to maintain overlapping federal claims when

premised on *specific* federal statutory provisions creating federal remedies. *See, e.g., Atchison, Topeka and Santa Fe R. Co. v. Buell,* ____ U.S. ____, 107 S.Ct. 1410, 94 L.Ed. 2d 563, 573-74, 576 (1987) (personal injury action under Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, not precluded by grievance and arbitral remedies provided in collective-bargaining agreement governed by Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*); *McDonald v. West Branch,* 466 U.S. 284, 288-292 (1984) (civil rights action brought under 42 U.S.C. § 1983 not precluded by award in prior arbitration proceeding conducted pursuant to collective-bargaining agreement); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 734-45 (1981) (action for back wages under Fair Labor Standards Act, 29 U.S.C. §§ 201-219, not precluded by prior submission of claims to joint grievances committee or by National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, and Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 171 *et seq.* (1982)); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 49-50, 59-60 (1974) (Title VII claim not precluded by grievance and arbitral remedies provided in collective bargaining agreement or by NLRA).

However, to prevent employees from circumventing arbitration simply by recharacterizing their state tort claims as implicating the policies or purposes underlying various federal statutes, federal courts applying this line of cases have limited this accommodation to actions brought under specific federal statutory sections. Consequently, courts have not permitted employees to litigate claims based on discharge or employment conditions in cases alleging, as in the instant case, violation of a *policy* underlying a federal statute. *E.g., Lewy v. Southern Pacific Transp. Co.,* 799 F.2d 1281, 1291-92 (9th Cir. 1986); *Lancaster v. Norfolk and Western Ry. Co.,* 773 F.2d 807, 813-14 (7th Cir. 1985); *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045, 1050-51 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007 (1984); *cf. Olguin v. Inspiration Consol. Copper Co.,* 740 F.2d 1468, 1475 (9th Cir. 1984).

In this case, respondents failed to invoke any specific federal statutory remedy and, to avoid pre-emption of their worksite dispute, attempt to bootstrap the OSHA policy onto their state common-law tort claims. Fed/OSHA prohibits employers from

discharging or discriminating against employees for exercising rights under the federal statute. 29 U.S.C. § 660(c). In respondents' words, the Fed/OSHA "scheme includes a prohibition on the retaliatory discharge of persons *who avail themselves* of the protections of Fed/OSHA." Resp. Br. at 6 (emphasis added). Respondents did not, however, "avail themselves" of the remedy provided in 29 U.S.C. § 660(c)(2). While the federal statute forbids retaliatory discharge, Fed/OSHA does not authorize a state common-law tort action to remedy the wrong. Section 660(c)(2) permits an aggrieved employee to file a complaint within 30 days of discharge with the Secretary of Labor; if after investigation a violation is found, the Secretary is authorized to bring an action in federal court on the employee's behalf. The district court is empowered with jurisdiction to restrain the violation and order reinstatement of the employee with back pay. Respondents never filed such a complaint with the Secretary of Labor. Nor did respondents even "avail themselves" of the Cal/OSHA remedy. Like Fed/OSHA, the California Occupational Safety and Health Act, Cal.Lab.Code § 6300 *et seq.*, which was approved by the Secretary of Labor, provides a reinstatement and back-pay remedy for complaints filed with the state enforcement division. Cal. Lab.Code § 6310. Moreover, § 6311 provides a state right of action for back wages if an employee is wrongfully discharged for refusing to work. The federally-approved state statutory scheme therefore does not provide an aggrieved employee with a right to assert common-law causes of action seeking tort and punitive damages. And no discriminatory discharge complaint or action for back wages ever was filed by respondents in accordance with the Cal/OSHA statute.

Contrary to the impression respondents attempt to create, this case does not present claims based on a specific federal statutory provision intended by Congress to create a federal cause of action. Respondents seek recovery based on state common-law remedies, and do not assert specific violations of, or invoke the remedies contained in, the provisions of the federal or California OSHA statutes. Respondents simply argue they can bypass binding arbitration of their workplace dispute, bypass the procedures of Fed/OSHA, and bypass the remedial provisions of Cal/OSHA, while still maintaining—in the name of public policy--common-

law tort claims that seek remedies not available at arbitration or under the federal or state safety statutes.

Consequently, there is no actual overlap in this case between respondents' discharge and working conditions claims and Fed/OSHA or Cal/OSHA. Because none of the common-law tort claims invokes remedies authorized under either statute, there is no "alteration" or disturbance of occupational safety laws.[1] Rather, the conflict is between state common-law claims arising out of a workplace dispute and the policy of § 301 of the LMRA to enforce agreements to arbitrate rather than litigate such disputes.[2] This is precisely the issue that led to the conflict-

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[1] An agreement to arbitrate safety disputes is not, as respondents suggest, contrary to federal or California law. *See* Resp. Br. at 10. Arbitration of worksite safety or safety-related discharge disputes does not alter federal or state safety standards or undermine the policies on which they are based. *See Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974) and *Paperworks v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651), discussed *infra* in Section III. Moreover, Cal.Lab.Code § 6310(b), one of the sections of Cal/OSHA forming the "public policy" component of respondents' state wrongful discharge claim, makes it a misdemeanor for an employer willfully to refuse:

> "to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a *grievance procedure, arbitration,* or *hearing authorized by law.*" (Emphasis added.)

"Obviously," as a California appellate court has observed, "that sentence contemplates that a grievance or arbitral tribunal might properly order reinstatement of an employee dismissed in retaliation for conduct of the sort protected under section 6310. . . ." *Hentzel v. Singer Co.*, 188 Cal.Rptr. 159, 167 (Cal.App. 1982).

[2] Contrary to respondents' assertion that the Ninth Circuit "properly le[ft] to the state court the determination whether pre-emption is a defense to any of [the five remanded "working conditions"] claims," Opp. Br. at 9, if respondents' only rights arise under federal law, the state court is without jurisdiction and "the district court has no discretion to remand the [claims] to state court." *Price v. PSA, Inc.*, 829 F.2d 871, 874-75 (9th Cir. 1987). Under the circumstances presented here, the district court's order remanding the "pendent state claims" was not pursuant to 28 U.S.C. § 1447(c) and therefore is reviewable. *See Id.* at

ing interpretations in the Circuits identified in the petition and motivating this Court's grant of certiorari in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, ____ U.S. ____, 108 S.Ct. 226 (1987).

III

THE PRESUMPTION OF ARBITRABILITY APPLIES TO WORKPLACE SAFETY DISPUTES

This Court already has decided that workplace safety disputes are subject to arbitration if such disputes, as here, are encompassed by the parties' collective-bargaining agreement. In *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), the Court rejected the argument made by respondents in this case: that federal policy encouraging arbitration is inapplicable to workplace safety disputes. Observing that "industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects," the Court criticized the fear that an arbitrator "might be too grudging in his appreciation of the workers' interest" in their own safety:

> We see little justification for the court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust. We also disagree with the implicit assumption that the alterna-

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874; *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 827 F.2d 589 (9th Cir. 1987); *Survival Sys. Div. of Whittaker Corp. v. District Court*, 825 F.2d 1416 (9th Cir. 1987); App. to Pet. for Cert. The Ninth Circuit below correctly held it *had* removal jurisdiction over all of respondents' claims based on the implied covenant wrongful discharge claim it found to arise under the collective-bargaining agreement. App. to Pet. for Cert. at A-7. As discussed in the petition, resolution of respondents' public policy wrongful discharge claim and the five remanded "working conditions" claims depends on analysis of the collective-bargaining agreement; the claims therefore arise under § 301 of the LMRA, leaving the state court without jurisdiction. The claims also involve arguably protected concerted activity subject to the exclusive jurisdiction of the National Labor Relations Board. Analyzed either way, the district court had no discretion to remand the pre-empted claims to a state court without jurisdiction.

> tive to arbitration holds greater promise for the protection of employees. Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure worker safety. Indeed, the safety of the workshop would then depend on the relative economic strength of the parties rather than an informed and impartial assessment of the facts.
>
> We therefore conclude that the "*presumption of arbitrability*" *announced in the Steelworkers Trilogy applies to safety disputes.* . . .

414 U.S. at 380 (emphasis added).

In concluding that safety disputes are subject to arbitration, this Court explicitly rejected the contention that federal safety statutes displace all agreements to arbitrate safety conditions, and concluded that a "fair reading of the Act discloses no congressional intention, either express or implied, to accomplish such a drastic result." 414 U.S. at 380 n.10. Federal Mine Safety and Health Act ("Fed/MSHA"), 30 U.S.C. §§ 801 *et seq.*

The policy concerns in the Fed MSHA—a safe and healthful workplace—are indistinguishable from those in OSHA. And each statute protects "the refusal to work in conditions which are believed to be unsafe or unhealthful." *Whirlpool Corporation v. Marshall,* 445 U.S. 1, 13 n.18 (1980); *compare* Fed/MSHA, 30 U.S.C. § 815(c)(1) with Fed/OSHA, 29 U.S.C. § 660(c)(1). The *Gateway Coal* decision supports the view that neither statute, however, precludes or supersedes arbitration of workplace safety disputes such as those at issue here.

This Court reaffirmed the strong federal policy favoring arbitration of workplace safety disputes last month in *Paperworkers v. Misco, Inc.,* 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651). In reversing the Fifth Circuit's decision to overturn an arbitration award on public policy grounds, the Court observed that the federal labor statutes reflect "a decided preference for private settlement of labor disputes without the intervention of government," noting that the "issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases." 56 U.S.L.W. at 4014, 4016 n.11.

Although it would seem to be clear that worksite disputes of the type disguised by respondents as common-law torts are subject to the same presumption of arbitrability and pre-emption analysis announced in this Court's prior decisions, the conflict among the Circuits, reflected by different outcomes in this case and in *Lingle,* calls for resolution by this Court of an issue vital to the interests of employees, unions and employers.

CONCLUSION

By seeking to apply a federal policy gloss to their state tort claims, respondents inadvertently highlight the need for this Court's guidance in resolving the conflict between upholding the paramount federal policy of resolving workplace disputes through arbitration and permitting unionized workers to bypass arbitration for a state court by asserting "public policy" claims. Public policy wrongful discharge claims originally were created by states to protect non-unionized workers. The fact that such policy-based claims vary from state-to-state threatens the efficacy of arbitration and the interpretive uniformity of federal labor law as tools to promote industrial self-government. This case not only presents the same issue as this Court accepted in *Lingle,* but adds a full range of discharge-related claims stemming from worksite disputes. It also raises an important issue of *Garmon* pre-emption because of the Ninth Circuit's decision allowing employees to circumvent the NLRB's exclusive jurisdiction simply by casting an unfair labor practice claim as state law torts. Accordingly, certiorari should be granted.

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Respectfully submitted,

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